No. 93-284

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SECURITY SERVICES, INC. v. K MART CORPORATION

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR AMICUS CURIÆ THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE IN SUPPORT OF RESPONDENT

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January, 1993

QUESTION PRESENTED

In an action by a motor common carrier subject to the provisions of the Interstate Commerce Act to recover additional tariff charges, does the Interstate Commerce Commission have authority to promulgate and apply a regulation declaring a carrier's mileage rate tariff unlawful and void when the carrier fails to provide a clear and explicit statement of its rates because it does not participate properly in a mileage guide tariff issued by an agent?

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The National Industrial Transportation League, pursuant to Rule 37.3 of the Rules of this Court, submit this brief as *amicus curiæ* in support of respondents. All parties have consented to the filing of this brief, and the original letters from counsel of record for the parties granting such consent have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIÆ

The membership of The National Industrial Transportation League ("League") is comprised of over 1200 shippers and groups and associations of shippers conducting industrial and/or commercial enterprises, large, medium and small, in all states of the Union. The members of the League are

substantial users of transportation by motor common carrier.

The League participates actively before administrative, judicial and legislative bodies to protect the interests of its shipper members. The League supports the result of the decision of the Interstate Commerce Commission ("ICC") in its Docket No. 40510, *Jasper Wyman & Son, et al. — Petition for Declaratory Order — Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C. 2d 246 (1992) [*"Jasper Wyman"*], *rev'd, Overland Express, Inc. v. ICC*, 996 F.2d 356 (D.C. Cir. 1993) [*"Overland"*].

In the *Jasper Wyman* decision, the ICC determined that one of its long-standing regulations, 49 C.F.R. §1312.4(d), made a mileage rate tariff void and unlawful when a carrier failed to maintain in effect either a power of attorney or a concurrence in a mileage guide tariff separately published by an agent that was incorporated by reference in the mileage rate tariff. 8 I.C.C.2d at 253-54. It also determined (as a separate grounds for its decision) that the mileage rate tariff did not contain an applicable rate when the agent that published the mileage guide tariff published a tariff showing on its face that the motor carrier was no longer a party. 8 I.C.C.2d at 255.[1] The Commission then concluded that, in either situation, there was no published and effective tariff that could provide a complete basis for establishing the rates the motor carrier was seeking from the shipper, and its claim for additional freight charges was invalid. 8 I.C.C. 2d at 247-8.

[1] The mileage guide involved in *Jasper Wyman* and this case was compiled and filed at the ICC by a tariff publishing agent, the Household Goods Carriers Bureau ("HGB"). Because of its national coverage and accuracy, this mileage guide is widely utilized by motor carriers of all types of commodities as the basis for distances used to calculate applicable rates based on mileages.

The Third Circuit's decision under review involves the application of the principles of the ICC's decision in *Jasper Wyman* to the facts of a particular case involving transportation provided by a motor common carrier, Security Services, Inc. (formerly known as Riss International, Inc.) ["Riss"] to K Mart Corporation, the respondent. The National Industrial Transportation League, as *amicus curiæ*, supports the respondent in this case.

SUMMARY OF ARGUMENT

Before the a shipper is subjected to the harsh effects of the filed rate doctrine, a motor carrier subject to the Interstate Commerce Act must first publish and file a tariff which contains a clear and explicit statment of the rate to be applied. the Interstate Commerce Commission has implied authority under the Act to adopt and apply a regulation that declares void as a matter of law a tariff that lacks such a clear and explict statement of the rate.

ARGUMENT

This case is the latest episode in the seemingly endless efforts by representatives of bankrupt and other non-operating motor carriers to collect additional freight charges on shipments occurring years before. Two recent cases have come before this Court as a result of those efforts: *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)["Maislin"] and *Reiter v. Cooper*, 507 U.S. ___, 113 S. Ct. 1213 (1993).

Those efforts have also now led to the passage of the Negotiated Rates Act of 1993, Pub. L. 103-180, 107 Stat. 2044 (Dec. 3, 1993). As explained in the legislative history, the purpose of this Act:

> is to provide a statutory process for resolving disputes for claims involving negotiated transportation rates brought about by trustees for non-operating motor carriers for past transportation services. The bill provides a procedure for settlement of such claims, as well as a statutory mechanism for certain other transportation regulatory changes

H. Rep't No. 359, 103rd Cong. 1st Sess., 7-8 (1993).

The new Act does not directly address the issue before the Court in this case. However, it does provide a clearer basis for resolution before the ICC of two defenses to the Riss' undercharge claim in addition to the one now before this Court,

neither of which were addressed by the courts below. *See* 996 F.2d at 1519, n.1. First of all, the new act provides that K Mart's claim that the transportation service provided by Riss was contract carriage, and not common carriage, must be resolved only by the ICC. *See* 49 U.S.C. §11101(d), as added by §8 of Pub. L. 103-180. It also modifies the standard for the ICC's determination of K Mart's claim (as allowed by *Reiter v. Cooper*) that the rate levels sought by Riss exceed a reasonable maximum level. *See* 49 U.S.C. §10701(e), as amended by §2(g) of Pub. L. 103-180.

In addition to the defenses temporarily put aside by the courts below, the new Act also provides two other remedies that might be available to K Mart and other similarly situated shippers who are being subjected to undercharge claims by representative of non-operating motor carriers. First of all, the Act allows a qualifying shipper to compel the representative to accept a compulsory satisfaction of the undercharge claim on the basis of certain percentages stated in the statute. 49 U.S.C. §10701(f), as added by §2(a) of Pub. L. 103-180. Finally, for shipments occurring before September 30, 1990, the new Act restores the unreasonable practice defense that was set aside by this Court in *Maislin*. §2(e) of Pub. L. 103-180.

Although the Negotiated Rates Act provides a variety of remedial provisions for shippers facing undercharge claims, the complete defense of failure to file and maintain a lawfully effective tariff was not addressed by the Congress, probably because of

the late appearance of the division between the several courts of appeals that have addressed this issue. *Compare* the decision of the court of appeals below, *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.* 989 F.2d 281 (8th Cir. 1993) and *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979, *with Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993), *Security Services, Inc. v. P-Y Transportation, Inc.* 3 F.3d 966 (6th Cir. 1993) and *Overland.*

Although the new Act will provide K Mart and other similarly situated shippers with several avenues of relief, even if this Court reverses the court of appeals, this Court should affirm the court of appeals because the application of the principles correctly established by the ICC's *Jasper Wyman* decision will provide a prompt and certain resolution of a considerable number of similar undercharge claims.

A. Application of the Filed Rate Doctrine Requires a Clear and Explicit Statement of the Rate in a Tariff

The fundamental flaw in the argument of the petitioners and supporting amicus (and in the decision of the D.C. Circuit in *Overland* upon which they rely) is a failure to recognize that the tariffs involved are incomplete and do not adequately disclose the applicable rate. If the filed rate doctrine is to be applied strictly, then motor common carriers have an equally strict obligation

under the Interstate Commerce Act to prepare and file correctly the tariffs that form the basis of the rate sought to be collected in the undercharge case. Before the filed rate doctrine can be applied, there has to be, as a matter of both fact and law, a filed rate that is clear and explicit. In this case, and all the others subject to the principles of the *Jasper Wyman* decision, well-established rules of law require a decision that there was no filed rate.

Ever since motor common carriers were first required to publish, file and observe tariffs, the ICC has required those tariffs to contain a clear and explicit statement of the applicable rates, including the means of determining distances for mileage-based rates. Exercising the authority provided by both 49 U.S.C. §10762(a)(1) ("The Commission may prescribe other information that motor common carriers shall include in their tariffs."), and 49 U.S.C. §10762(b)(1) ("The Commission shall prescribe the form and manner of publishing, filing and keeping tariffs open for public inspection ...."), the ICC's regulations in effect at the time the shipments at issue were transported required rates in tariffs to be clear and explicit:

> Rates, fares, and provisions shall be clearly stated and arranged in a systematic manner which establishes the rate ... for each service offered or performed by the serving carrier. ... [O]ther tariff elements required to determine the applicable rate ... shall be clearly explained.

49 C.F.R. §1312.14(a).[2]

As applicable to motor common carriers, 49 U.S.C. §10762(a)(1) is derived from Section 217(a) of the Act, as added by the Motor Carrier Act of 1935, §1, 49 Stat. 560 (Aug. 9, 1935). The ICC immediately after the 1935 Act interpreted this provision as requiring a clear means on the face of the tariff for determining distances in deriving the applicable rates from rate tables based on distances. *Mid-Western Motor Freight Tariff Bureau v. Eichholz*, 4 M.C.C. 755, 757 (1938)(prohibiting the use of speedometer readings to determine applicable rates based on distances). At the same time, the ICC recognized that, before a tariff could be applied under section 217(b) of the Act (now 49 U.S.C. §10761(a)), they must be strictly construed, and any reasonable doubts as to their meaning must be construed in favor of the shipper and against the carrier. *See, e.g., W. A. Barrows Porcelain Enamel Co. v. Cushman Motor Delivery Co.* 11 M.C.C. 365, 369 (1939).[3]

It would be a manifest injustice to require a shipper to comply with the statutory requirements for strict observance of a tariff, 49 U.S.C. §10761(a), when he cannot determine with cer-

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2 The ICC's latest revised tariff regulations, which are not yet applicable to motor common carriers, contain a nearly identical requirement. 49 C.F.R. §1314.3.

3 *See also C & H Transportation Co. v. US*, 436 F.2d 480, 482 (Ct. Cl. 1971).

tainty the rate. The ICC's regulations requiring a tariff to contain a clear and explicit statement of the rate is a recognition of this fundamental principle. This requirement for certainty and clarity in the application of the filed rate is an essential element of the regulatory scheme. *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379-80 (D.C. Cir. 1986).

This Court has held that a "tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon [carrier] and shipper alike." *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913) If, as this Court has stated in *Maislin*, 497 U.S. at 127-28 and n.9, a shipper is thus to be "conclusively presumed" to have constructive knowledge of the contents of a filed tariff (even though he may never have actual knowledge of those contents), then that tariff ought to be complete and accurate. When the tariffs published and filed by a motor carrier on their face do not permit a clear and explicit determination of the rate, because the carrier is not shown as a participating carrier in the separate mileage guide tariff purportedly incorporated by reference into the underlying distance rate tariff, then a shipper does not have a legal basis for determining the applicable rate.

By way of analogy, this Court has long held that criminal statutes are void for vagueness "where one could not reasonably understand that his contemplated conduct is proscribed." *United States v. National Dairy Products Corp.* 372 U.S.

29, 32-33 (1963). In view of both the criminal penalties that can attach to both shipper and carrier for failure to observe filed tariffs (*see Maislin*, 497 U.S. at 120, and note 2), and the "harsh effects of the filed rate doctrine" (*Id.* 497 U.S. at 128), it would be entirely logical to apply a similar standard for required clarity in the application of those tariffs. In this case, the absence of Riss from the list of carriers participating in the HGB Mileage Guide would make it reasonably clear to any person that Riss did not have a rate that could be applied. A shipper who could reasonably make such a determination cannot and should not be subjected to liability for additional freight charges.

A hypothetical situation makes the point even clearer. If a shipper, such as K Mart, had actually examined various tariffs filed at the ICC or provided by Riss, in advance of making some shipments of property, to determine which motor carriers had a rate on file that would be available for its use, it would have immediately determined that Riss was not a carrier it could use. On their face, the tariffs do not provide a clear and explicit mileage rate that K Mart could determine, because Riss would clearly be absent from the published and filed list of carriers participating in the HGB Mileage Guide, notwithstanding its effort to incorporate the provisions of the Guide by reference. This plainly creates uncertainty as to the applicability of the rate. Under these circumstances, K Mart would select another carrier, and the tariff publication would have served its purpose of establishing a clear and

explicit rate for use by the shipper. No shipper should be charged with constructive knowledge and application of a tariff rate which it would not use if it actually examined the tariff involved.

Recognition of the need to make the application of the filed rate doctrine dependent on the existence of a clear and explicit filed rate also is consistent with this Court's decisions in *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924) and *Berwind-White Coal Mining Co. v. Chicago & E. R. Co.*, 235 U.S. 371 (1914). For example, in the latter case, the Court explicitly noted that the tariffs involved satisfied the Act's requirements because "it is certain as a matter of fact they were adequate to give notice." 235 U.S. at 375. In the *Davis* case, the issue was more complicated, because the central question was whether a shipper could obtain without proof of actual injury the application of a lower rate from a more distant point in order to prevent a violation of what is now 49 U.S.C. §10726. This Court held that it could not permit application of a rate other than the published higher rate from the intermediate point "without proof of pecuniary loss." 264 U.S. at 425. In any case, the tariff publications establishing both the higher and lower rates were clear. 264 U.S. at 415.

In short, these two cases both recognized the need for tariffs to contain clear and explicit statements of the rates that provide "adequate notice" to shippers of the applicable rate. Because the tariffs relied on by Riss as the basis for seeking additional charges from K Mart are not clear and

explicit, they may not form the basis of any recoveryof undercharges by Riss.

B. THE UNCERTAINTY OF RISS' MILEAGE RATES MAKES THEM VOID AS A MATTER OF LAW

When there is a recognition that the Interstate Commerce Act, as interpreted and applied by the ICC in order to carry out its purpose, requires a clear and explicit statement of the rate in order to permit application of the filed rate doctrine, it immediately follows that the Commission may adopt regulations to enforce that requirement. In this case, the Commission's regulations contain a provision that a tariff that is incomplete because of a lack of proper participation is "void as a matter of law." 49 C.F.R. §1312.4(d). When such a regulation is applied so as to refuse to apply defective tariffs to past shipments, it satisfies the requirements of this Court's decision in *ICC v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984).

In this case, Riss seeks to collect mileage based rates stated in a rate tariff that referenced the HGB Mileage Guide as the governing publication from which mileage between origin and destination points were to be calculated. This was a proper manner for Riss to publish mileage-based rates only if Riss also executed a power of attorney or concurrence authorizing the Bureau to act as Riss' tariff publication agent during the period relevant to the complaint. Riss did not do so.

The Commission's tariff regulations recognize that distance or mileage rates may be filed, but provide that the determination of distances must be based on one of three methods:

> 1) By publishing the distances between all locations covered by the distance rates in the tariff;
>
> 2) By referring to a map(s) attached to the tariff; or
>
> 3) By referring to a distance guide.

49 C.F.R. §1312.30(a), (c).

Under the Commission's regulations, "only distance guides officially on file with the Commission may be referred to." 49 C.F.R. §1312.30(c)(4). Critical to this case are two the regulatory requirements imposed on Riss at the time it filed its tariffs. First, that "carriers participating in tariffs that refer to, and are governed by, separate tariffs shall also participate in those governing separate tariffs." 49 C.F.R. §1312.27(e). Second, that issuance of a concurrence or a power of attorney is a necessary condition for participation in another party's tariff. 49 C.F.R. §1312.4(d).

Riss chose the third method specified in 49 C.F.R. §1312.30(c), by referring in its tariff to the HGB Mileage Guide. This choice did not, by itself, violate 49 C.F.R. §1312.30 because it provided the Household Goods Carriers Bureau with authority to file a mileage guide, and because the HGB Mileage Guide in fact was properly on file with the

Commission as required by 49 C.F.R. §1312.30(c)(4). But because the Riss rate tariff referred to another tariff filed by an agent, namely the HGB Mileage Guide, Riss was required to participate in the HGB Mileage Guide through the issuance of a formal concurrence or power of attorney to the Bureau. *See* 49 C.F.R. §§1312.4(d), 1312.27(e) and 1312.10. Riss failed to comply with this regulatory requirement, and by operation of the last sentence of 49 C.F.R. §1312.4(d), the Riss tariff therefore is void as a matter of law. Without a lawful means to determine the mileage to which the rate in the carrier's tariff should be applied, Riss has no basis for an undercharge claim. This is the same analysis applied by the ICC in *Jasper Wyman* (*see* 8 I.C.C.2d at 252-256), and it is equally applicable here.

Relying on such cases as *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924), *Berwind-White Coal Mining Co. v. Chicago & E. R. Co.*, 235 U.S. 371 (1914) and *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied, Nitrochem, Inc. v. ICC*, 456 U.S. 905 (1982), petitioners (and the D.C. Circuit in *Overland*) have taken the position that the tariffs contain only "mere irregularities." But this contention overlooks the fact that 49 C.F.R. 1312.4(d) involves more than "mere irregularities." As applied in this case, it is part of the implementation of the "utterly central" directive from Congress to the ICC to ensure that filed rates are clear and explicit. None of the regulatory provisions

involved in those cases reflected the need to ensure a clear and explicit statement of the rates by declaring a tariff void as a matter of law for non-compliance, which is the case with 49 C.F.R. §1312.4(d).

It may be true that 49 C.F.R. §1312.4(d) is a regulation that retroactively voids an effective tariff. But as the Fifth Circuit held, the ICC's interpretation and application of 49 C.F.R. §1312.4(d) conforms with the standards stated in *ICC v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984)["*ATA*"]. *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d at 1570-72. In the *ATA* case, this Court held that the Interstate Commerce Commission has implied authority under 49 U.S.C. §10321(a) to void and declare unlawful effective tariffs "when necessary to achieve specific statutory goals." 467 U.S. at 365. The Fifth Circuit and the ICC in *Jasper Wyman*, both ruled that 49 C.F.R. §1312.4(d) is within the Commission's authority because the regulation is directly and closely tied to the statute as a necessary means of enforcing the Commission's specific statutory mandate to determine the basic information that must be provided in every tariff and to ensure that the rates contained in the tariff are clear and explicit. 969 F.2d at 1570-72, and 8 I.C.C.2d at 256-260.

The principles of *Jasper Wyman* apply not just to the use of mileage guides, but to any situation where a carrier might create uncertainty and indefiniteness with respect to the applicable rate, by referring to another tariff in which it does

not participate. For example, soon after issuing *Jasper Wyman*, the Commission held, with judicial approval, that a carrier may not recover undercharges pursuant to a filed tariff that incorporates by reference, but without formal carrier participation, a separate classification tariff. *Wonderoast, Inc.--Petition for Declaratory Order--Certain Rates and Practices of Transportation Systems International, Inc.*, 8 I.C.C. 2d 272 (1992), *aff'd. sub nom., Lovett v. Wonderoast,* 1992 Bkrtcy LEXIS 1414, Adv. No. 4-89-292 (D.Minn. June 26, 1992).

In summary, 49 C.F.R. 1312.4(d) was properly and lawfully applied by the ICC to void, *ab initio* and as a matter of law, a tariff of a carrier that refers to an agent's or second carrier's tariff in which the publishing carrier is not a formal participant. As a matter of law, the application of tariff can be voided in order to enforce the requirement that Riss' mileage rate tariff contain clear and explicit rates. Without such a tariff, no basis exists for calculating the mileage so that the rates in Riss' tariff could be applied as a filed rate to the shipments of K Mart.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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